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April 20, 2010

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW,
Room TW-A325
Washington, DC 20554

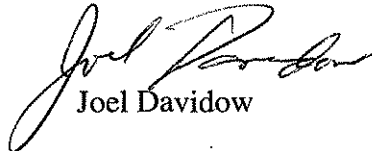
Re: In the Matter of Petition for Declaratory Ruling and Alternative Petition for
Preemption to the Pennsylvania, New Hampshire and Maryland State
Commissions WC Docket No. 10-60

Dear Ms. Dortch:

Pursuant to Section 1.1206(b) of the Commission's Rules, 47 C.F.R. § 1.1206(b), this letter is to provide notice of written *ex parte* comments. Specifically, the attached "Ex Parte Comments of Global NAPs on Submissions Made in the Form of Replies" was filed electronically in the above-captioned dockets through the Commission's Electronic Comment Filing System procedures. If you have any questions or require additional information, kindly contact the undersigned at (202) 659-8000.

Thank you for your attention.

Sincerely,


Joel Davidow

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of Petition for Declaratory
Ruling and Alternative Petition for Preemption
to the Pennsylvania, New Hampshire
and Maryland State Commissions

WC Docket No. 10-60

**EX PARTE COMMENTS OF GLOBAL NAPS ON SUBMISSIONS MADE IN
THE FORM OF REPLIES**

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Dated: April 20, 2010

Global supplements its scheduled reply to the nineteen comments filed on its Request for Declaratory Ruling and Petition for Preemption with these brief comments on the seven submissions made after the date for initial responses set in the public notice.¹

I. VERIZON'S REPLY COMMENTS

In its reply comments, Verizon submits another deeply ambivalent filing. Their comments laudably and persuasively urge that:

The Commission should promptly resolve this uncertainty once and for all by reaffirming the holding of the *Vonage Order* that all VoIP and IP-based services—regardless of provider or technology—are interstate for jurisdictional purposes and are subject to the Commission's exclusive jurisdiction.

(Verizon Comments, at 3).²

Verizon then proceeds to state, somewhat petulantly, that any declaration by the Commission that Global's points are correct should be made not in this proceeding, but in some more complicated rulemaking where Global hopefully will not be able to benefit from the pronouncement. *Id.* at 4. How this postponement would help Verizon remains unclear because the same result would still occur if Global's requests had been, or eventually are, filed by someone else.

In any event, Global and Verizon are not engaged in tariff litigation, but in litigation concerning whether an ICA that does not even contain a reference to VoIP can be read to specifically include VoIP as telecommunications, rather than an exempt

¹ The Missouri Small Telephone Company Group merely filed a statement in support of NECA, whose comments we have already replied to, and adds nothing substantive to this discussion. (Missouri Comment, at 1). Thus, we have no additional reply to that comment.

² Citing *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, 19 F.C.C.R. 22404, 2004 WL 2601194 (2004) (*Vonage*).

information service. Because Global did not seek any holdings on the information versus telecommunications classification issue in its Petition, this Commission does not need to address that particular concern in order to grant the relief Global requested.

II. SPRINT NEXTEL CORPORATION'S COMMENTS

Global agrees with most of the rather extensive comments submitted by Sprint Nextel Corporation (Sprint). Although Sprint makes many excellent points, it begins with a distressing misinterpretation of Global's petition.

Sprint's misconception is that Global is seeking declaratory relief only for itself. (Sprint Comments, at 1). Global mentioned in passing that its interest in these issues stems from actual cases, but then surveyed numerous cases in which it was not involved and which would be equally simplified and better decided upon this Commission's grant of the requested clarifications of law.

Global's primary request that the Commission declare nomadic VoIP traffic is not subject to intrastate access charges, would serve to prevent any tribunal from doing to any VoIP forwarder what the Pennsylvania PUC seeks to do to Global.

Although it questions Global's motivation, Sprint agrees with many of Global's key points. Like the VON coalition, and like Judge Robertson in *Paetec*³, Sprint favors a rule that nomadic VoIP is subject to neither intrastate nor interstate rates. (Sprint Comments, at 2). Thus, it would necessarily favor achieving the first half of that proposition, which is all that Global seeks here.

³ *Paetec Communications, Inc. v. CommPartners, LLC*, 08-cv-0397-JR (D.D.C. Feb. 18, 2010) (*Paetec*).

Global only asked for clarification on intrastate charges and kept its request narrow in order to leave the questions of interstate VoIP classification or rates for a later day and a broader proceeding. Global requested clarification on the intrastate charge issue because inapplicability of intrastate rates was clearly settled in *Vonage* in 2004, but, unfortunately, continues to percolate due to misuse of the Commission's statement in *Vonage* that it was not ready to deal with the level of interstate rates. This statement has been read by some ICOs and state commissions to leave wiggle room for imposition of outrageously high intrastate legacy rates. Since Judge Rakoff has issued a ruling⁴ this month which reads *Vonage* with its intended meaning, it seems entirely appropriate for this Commission to publicly affirm that Judge Rakoff, the New York PSC⁵ and the Maryland ALJ⁶ all ruled correctly.

After favoring exemption of intrastate and interstate rates, Sprint goes on to express its agreement with Global's fourth request that this Commission clarify that intermediate VoIP carriers are allowed to benefit from exemptions from access charges. *Id.* at 9.

III. COMMENTS MADE BY LEVEL 3

Level 3, a large wholesale carrier, joined Sprint in agreeing with the analysis underlying Global's fourth request for clarification, stating that "[j]ust because that

⁴ *Manhattan Telecommunications Corp. v. Global NAPs Inc.*, 08-civ-3829 (JSR) (Findings of Fact and Conclusions of Law issued March 31, 2010) (*Met Tel*).

⁵ PSC Case No. 07-C-0059, *Complaint of TVC Albany, Inc. d/b/a Tech Valley Communications Against Global NAPs, Inc. for Failure to Pay Intrastate Access Charges*, Order dated Mar. 20, 2008.

⁶ *In the Matter of the Investigation Examination and Resolution of Payment Obligation of Global NAPs Maryland, Inc. for Intrastate Access Charges Assessed by Armstrong Telephone Company –Maryland*, Case No. 9177, Proposed Order of Hearing Examiner (issued Dec. 30, 2009)(*Armstrong*).

[enhanced] traffic may come from a wholesale carrier does not in itself change the application of the ESP exemption or the appropriate intercarrier compensation rules for enhanced traffic.” (Level 3 Comments, at 8). It thus supported Global’s point that exemptions for all enhanced traffic (including VoIP) apply to wholesalers at least as much as they apply to providers or retailers.

Level 3 also sets out cogent reasons in support of the point made in Global’s reply comments that the recent FCC rulings in *UTEX*⁷ provide no reason for resisting Global’s petition. *Id.* at 9-10.

Level 3 also discusses at length an issue not raised by Global’s requests. That issue is the meaning of the word “enhancement” and the nature of the ESP exemption or the proper interpretation of the effect of this Commission’s ruling against AT&T in *IP-in-the-Middle*.⁸ Again, however, Global did not ask this Commission to address the classification of VoIP as either a telecommunications or an information service or reach determinations regarding what level of enhancement is sufficient to fall within the ESP Exemption, but rather only sought clarification based upon this Commission’s assertion of authority pursuant to the “impossibility exception.”

IV. NASUCA COMMENTS

The brief comments of the National Association of State Utility Consumer Advocates (NASUCA) voice a clear falsity at the outset. They contend that Global has

⁷ *Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas*, WC Docket No. 09-134, Memorandum Opinion and Order, 24 FCC Rcd 12573 (2009) (*UTEX*).

⁸ *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, FCC WC Docket No. 02-361, FCC 04-97, ¶¶ 1, 9 (released April 21, 2004) (*IP-in-the-Middle*).

filed its requests in order to avoid paying anyone anything for terminating its traffic. (NASUCA Comments, at 2). Global made quite clear that its first three requests deal only with one form of compensation: intrastate tariffs. In its fourth request, Global made equally clear its position that it is subject to negotiated rates when it interconnects pursuant to section 251 and that it is willing to pay, and in New York has paid (to TVC), a \$.00045 per MOU market-based rate derived from arm's length negotiations akin to those found among Verizon, AT&T, Level 3, Sprint and others.

Commenting on Global's third request, the NASUCA argues, claiming support from Verizon, that phone numbers are useful and reliable for geographic identification of a call's end point, citing page 10 of Verizon's comments. (NASUCA Comments, at 3). They fail to notice Verizon's caveat on page 11 that LERGs are not reliable to determine the end points of calls that are wireless or originate from "pick your own area code" (i.e., VoIP) services and are thus only a "good tool" for dealing with traditional technologies such as "TDM-originated calls." Since Global's request deals only with nomadic VoIP, Verizon's comments on page 11 support Global's request, not the NASUCA's attempted criticism of Global's request.

V. GEORGIA PUBLIC SERVICE COMMISSION'S COMMENTS

The comments of the Georgia Public Service Commission (GPSC) require little or no rebuttal. They contend that the results of their proceeding involving Global were justified due to lack of evidence that Global carries forms of traffic which are exempt from intrastate charges. (GPSC Comments, at 1). Global never mentioned that proceeding in connection with its requests or its petitions for preemption. It does appear now, based upon the findings of the Judge Rakoff (resting on Vonage and Transcom

testimony) that the Georgia Commission came to the wrong factual conclusion, even if it was one they had a right to make under strict application of their evidentiary standards. Nonetheless, their comments have no import here, as they do not directly bear on any of the issues raised in Global's request for declaratory ruling or its petition for preemption.

VI. COMMENTS OF THE ARIZONA CORPORATION COMMISSION

The filing of the Arizona Corporation Commission misses the point. Global asked for a narrow declaration that nomadic VoIP is not subject to intrastate tariffs and for preemption of rulings like that of the Pennsylvania PUC accepting factual findings that billed calls consist of nomadic VoIP and order payment of intrastate tariff charges on those calls anyway. Arizona chooses to discuss a number of points not at issue.

Arizona says that use of non-nomadic VoIP (cable) may be growing, but admits that the requested declarations and preemptions do not deal with that subject. Global did, however, repeatedly point out this Commission's stated intent to preempt state attempts at regulating such services. Arizona also refers to imposition of access charges in cases where the origination point of the traffic is known, but fails to address situations involving the utilization of "virtual" codes and portable customer premises equipment.

VII. COMMENTS OF THE TEXAS STATEWIDE TELEPHONE COOPERATIVE, INC.

The Texas Statewide Telephone Cooperative repeats the frequent ICO argument that access charges should apply regardless of the technology used to transmit the call. This identical argument (and tariff language) was rejected by Judge Robertson in the recent *Paetec* opinion, where he stated that although Paetec's tariff expressly covered all traffic regardless of technology, access charges still could not be imposed on the VoIP calls at issue. *Paetec*, at 11. Moreover, this argument does not address Global's point

that virtual numbers prevent a billing party from correctly determining the geographic origination point of a call. The use of “virtual” phone numbers (which are issued on request by all VoIP companies that purchase numbers) is not an alternate “technology.” However, as *Vonage* notes, use of these numbers makes it impossible to distinguish between an intrastate call and an interstate call. Thus, as Verizon stresses, the reliability of charging any special (astronomically higher) intrastate rates has been destroyed by recent realities.

VIII. PENNSYLVANIA PUBLIC UTILITY COMMISSION REPLY COMMENTS

The Pennsylvania PUC’s reply comments are distressing for several reasons. First, the PAPUC says it used formal adjudication to “establish” the applicability of intrastate access charges to calls “that had been initiated in nomadic VoIP or IP-enabled protocol.” (PAPUC Comments, at 3). The PAPUC’s distinguished ALJ (who actually heard the evidence) ruled the opposite way of the full PAPUC on every crucial point. The full commission gathered no new evidence. So, all the PAPUC “established” is that it has the political will to overrule its ALJ while ignoring the evidence, the Maryland ALJ’s order, *Vonage* and, possibly, the recent contrary rulings of Judge Robertson and Judge Rakoff.

The PAPUC reply goes on to quote comments from the California PUC, which has never been involved in a Global case involving intrastate tariffs and has refused to follow findings that Global’s traffic is primarily nomadic VoIP. *Id.* 3-4.

Lastly, the PAPUC attempts to find some support in the NYPSC’s comments. Certainly, it can find no support in the New York commission’s reaffirmation that Global may not be billed under an intrastate tariff. The PAPUC finds solace instead in the

NYPSC's musing that Global should pay interstate access charges (or a like amount) to ICOs. *Id.* at 4. The law is clear, however, that neither the NYPSC nor the PAPUC has authority to adjudicate or enforce claims for interstate access charges. Moreover, both the Pennsylvania and the New York filings ignore the holdings of Judge Robertson and Judge Rakoff that carriers like Global owe neither intrastate nor interstate tariff charges on their nomadic VoIP traffic.

The PAPUC reply also argues that Global's wholesaler status exposes it to access charges. The contrary is true. The PAPUC ignores the holdings in *IP-in-the-Middle* and *Time Warner* that VoIP wholesalers are not subject to intrastate or interstate access charges, but rather have a right to demand interconnection that will result in payments which are negotiated, cost-based and non-discriminatory.⁹ In Pennsylvania, Global has followed the dictates of *Time Warner* exactly, offering to connect directly with Palmerton and compensate it on the basis of the same \$.00045 per MOU rate that Verizon charges for completing the same types of calls in Pennsylvania and elsewhere. The PAPUC has not yet issued a final response to that proposal but its support of the NYPSC interstate rate suggestion, implies that it will not accept Global's cost-based figure until instructed to do so by this Commission.

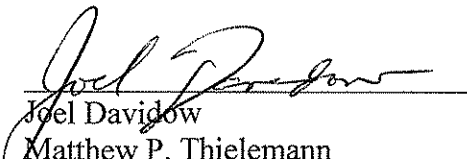
⁹ *In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, DA 07-709, Memorandum Opinion and Order, ¶ 17 (March 1, 2007) (*Time Warner*).

CONCLUSION

The key choice presented by Global's petition is whether to dispose of the state tariff issues now to allow the broader intercarrier proceeding to deal with purely federal issues, or to wait and add these issues to mix later.

The question, properly understood, largely answers itself. Ruling on the technological, economic and definitional issues involved in IP pricing is certainly complex enough without involving issues of state versus federal jurisdiction. Moreover, the issues of whether VoIP is in-state and pays legacy charges or interstate and subject only to federal rates has already been answered, clearly, by this Commission in 2004—a holding echoed by multiple federal courts over the years. The only problem is the refusal of some state commissions and ICOs to accept the FCC rulings and comply with them. This mini-rebellion should end here and now before more legal resources are wasted and more new entrants harassed.

Respectfully submitted by


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Dated: April 20, 2010

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